

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Birach Broadcasting Corporation)	File No. BP-19860725AB
Unbuilt Station DWIJR(AM))	
Palm Beach Gardens, Florida)	Facility ID No. 90157

ORDER ON RECONSIDERATION

Adopted: March 10, 2005

Released: March 15, 2005

By the Commission:

1. Birach Broadcasting Corporation (“Birach”) seeks reconsideration of the decision released January 31, 2003, in which the Commission affirmed the staff’s denial of Birach’s request for additional time to construct unbuilt station WIJR(AM),¹ Palm Beach Gardens, Florida.² For the reasons set forth below, we deny Birach’s Petition for Reconsideration.

I. BACKGROUND

2. The construction permit for WIJR(AM) was issued to Leo Kesselman d/b/a Palm Beach Gardens Radio (“Kesselman”) for the three-year period from March 9, 1998, to March 9, 2001. Commission rules require that a radio station permittee complete construction within three unencumbered years of the original permit grant.³ This construction period may be tolled only in limited circumstances enumerated by our rules or by rule waivers based on “rare and exceptional circumstances” beyond the permittee’s control.⁴ On December 21, 2000, Kesselman filed an application to assign the permit to Birach.⁵ While the assignment application was pending, Birach, the then-proposed assignee, requested a revised construction deadline based on circumstances that allegedly made it difficult for Kesselman to build the facilities, including loss of site, lack of experience in Florida, and high land prices.⁶ On

¹ The call sign is listed in the Commission’s database as “DWIJR(AM)” to reflect its deletion, as discussed *infra*, para. 3.

² See *Birach Broadcasting Corp.*, 18 FCC Rcd 1414 (2003) (“*Memorandum Opinion and Order*”).

³ 47 C.F.R. § 73.3598(a); *Streamlining of Mass Media Applications, Rules, and Processes*, 14 FCC Rcd 17525, 17541 (1999) (“*Streamlining MO&O*”).

⁴ Specifically, radio permits may be tolled by administrative or judicial review of the grant of the subject permit, by court proceedings related to a necessary legal, state, or federal requirement, by natural disaster “acts of God,” or by failure of a Commission-imposed condition precedent. 47 C.F.R. § 73.3598(b); *Streamlining MO&O*, 14 FCC Rcd at 17537, 17540.

⁵ The staff granted the assignment application on March 1, 2001. See File No. BAP-20001221AAG.

⁶ Birach informed the staff that “Birach has agreed to buy the permit, unconditionally, regardless of whether the permit is or is not extended.” *Birach’s Petition to Toll Expiration of Construction Permit* at 1-2 (Jan. 31, 2001).

February 7, 2001, the staff denied the request,⁷ finding that it was not properly documented and, in any event, did not satisfy the criteria for tolling or waiver.⁸ Birach sought reconsideration on March 1, 2001, which the staff denied on March 6, 2001. Birach and Kesselman consummated the assignment on March 8, 2001, one day before the construction permit expired.

3. Birach filed an Application for Review on March 29, 2001, asking the Commission to change its tolling policies. The Commission denied review on January 31, 2003, and directed the staff to delete call sign WIJR(AM) from the Commission's database, finding that Kesselman had unnecessarily tied up limited spectrum and deprived the public of service by doing little during the construction period other than to market the permit.⁹ This case, the Commission stated, illustrates precisely the sort of nonfeasance that the streamlined construction period rules were designed to eliminate. On March 3, 2003, Birach filed its Petition for Reconsideration, which it supplemented on March 14, 2003. Birach argues that the Commission should reconsider its decision based on two matters that post-date Birach's Application for Review. First, Birach cites a July 3, 2001, court decision in *National Public Radio* which delayed the Commission's ability to accept applications to construct new broadcast stations.¹⁰ Second, Birach observes that the Commission initiated an ownership rulemaking proceeding in November 2001, expressing concern about competition and ownership concentration in local radio markets.¹¹ Birach predicts that it could be years until the Commission invites new applications for broadcast construction permits and grants a permit to a successful applicant who can then initiate first local service to Palm Beach Gardens,¹² thereby adding a new independent voice to what Birach considers a highly concentrated market.¹³ By granting an additional year to build WIJR(AM), Birach claims, the Commission would better meet its goals of expediting service to the public and fostering competition.

II. DISCUSSION

4. The Commission will entertain a petition for reconsideration of the denial of an application for review if the petition relies on new or changed circumstances that occurred after the petitioner's last opportunity to present such matters or that were then unknown to the petitioner.¹⁴ Birach

⁷ Letter to Lauren A. Colby, Esq. (Feb. 7, 2001).

⁸ See 47 C.F.R. § 73.3898(b); *Streamlining MO&O*, 14 FCC Rcd at 17541.

⁹ *Memorandum Opinion and Order*, 18 FCC Rcd at 1416-17.

¹⁰ *National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) ("*National Public Radio*"). The decision struck down Commission rules that would have allowed noncommercial educational ("NCE") entities to compete with commercial entities in auctions for spectrum not reserved solely for NCE use. As a result of the court's decision, the Commission adopted new rules governing the application process. See *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, 18 FCC Rcd 6691 (2003).

¹¹ See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001).

¹² According to Birach, there is a "palpable" need for service in Palm Beach Gardens because there is currently no station licensed to that community. Birach's analysis also shows, however, that Palm Beach Gardens and/or surrounding areas receive service from at least 37 radio stations. *Supplement to Petition for Reconsideration* at 1.

¹³ Birach bases its opinion that the market is "highly concentrated" on an internet web site (www.radioandrecords.com) from which it generated a report indicating that nine of the eleven stations receiving the highest audience share ratings in the West Palm Beach, Florida market during Winter 2003 are owned by Clear Channel Communications and Infinity Broadcasting. Internet-based information is generally insufficient to raise a *prima facie* case of inadequate competition in a broadcast market. Cf. *Secret Communications II, LLC*, 18 FCC Rcd 9139, 9148-49, n. 55 (2003).

¹⁴ See 47 C.F.R. § 1.106(b)(2). Pursuant to that rule, we do not consider Birach's untimely new argument that Birach consummated the assignment in reliance on the staff's finding that the proposal would serve the public

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argues that the Commission's need to adopt new application procedures following *National Public Radio*, and the resulting delay in selection of a replacement permittee in Palm Beach Gardens, are significant new circumstances. The staff opened an AM filing window from January 24, 2000, to February 1, 2000¹⁵ and, due to the *National Public Radio* litigation, was unable to open the next AM window until January 26, 2004 to January 30, 2004. Such circumstances form no basis for tolling of the Palm Beach Gardens permit, however. Where, as here, a permittee has experienced no encumbrances to construction, tolling would be inappropriate regardless of the amount of time it may take to select a replacement permittee. Further, there was significant interest during the recent AM filing window in constructing a new station using the spectrum that would have been occupied by WIJR(AM).¹⁶

5. We also reject Birach's related argument that granting its request for additional time would be preferable to considering new proposals to construct similar facilities, submitted during a filing window. Birach's argument focuses on expediting new broadcast service to the public, a goal of the Commission's three-year construction period and limited tolling criteria. Birach ignores, however, that the primary means for achieving that service goal is "preventing the warehousing of spectrum."¹⁷ The public receives service quickly when permittees plan construction carefully and, absent legitimate encumbrances or extraordinary circumstances beyond the permittees' control, take all steps needed to complete construction timely. Even if we were to accept that Birach could initiate new service more quickly than a new applicant subject to auction procedures, we would reject Birach's request for more time. As we indicated in denying Birach's Application for Review, the primary reason that listeners in Palm Beach Gardens have not received new radio service is the prior permittee's inaction.¹⁸ By requiring assignees to assume the permit's remaining construction period, the Commission intends to discourage the situation that occurred here; namely, an assignor's inefficient use of unencumbered spectrum.¹⁹ We reiterate that we expect applicants and parties interested in acquiring outstanding construction permits to determine the viability of the proposed site prior to filing their initial applications with the Commission. The inability of a permittee subsequently to modify its proposed site, whether due to the timing of a filing window or other circumstances, does not form a basis for extending the permit's construction deadline.

6. Similarly, concerns about competition and concentration of ownership do not support favorable action on Birach's Petition for Reconsideration. In initiating the ownership rulemaking proceeding to address such concerns, the Commission articulated its goal to ensure, *inter alia*, a competitive local radio market while enabling radio owners to achieve significant efficiencies through

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interest and, therefore, that the staff's failure to give Birach adequate time to build was arbitrary and inconsistent. Birach could have raised such matters in its Application for Review.

¹⁵ Kesselman could have filed an application for a major change to the station's facilities during that window.

¹⁶ The WIJR(AM) permit specified service to Palm Beach Gardens on 1100 kHz. In the recent window one applicant proposed a new 1100 kHz station at Palm Beach Gardens (File No. BNP-20040130BCN). Three other applicants requested this frequency for service to communities near Palm Beach Gardens, and two more filed applications for use of 1100 kHz in more distant Florida communities that are mutually exclusive with the Palm Beach Gardens application. Notably, Birach applied in that same window for a permit to construct a new 1100 kHz station at Greenacres, Florida, about 16 miles south of Palm Beach Gardens.

¹⁷ See *Streamlining MO&O*, 14 FCC Rcd at 17539.

¹⁸ See *Memorandum Opinion and Order*, 18 FCC Rcd at 1416.

¹⁹ See *Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23088 and 23090 (1998) ("*Streamlining R&O*").

consolidation.²⁰ Applicants for initial construction permits and for the assignment of permits or licenses must demonstrate that their proposed ownership complies with the Commission's multiple ownership rules. Our tolling process is not meant to examine such matters anew, but only to recognize any legitimate obstacles to construction.²¹

7. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Birach Broadcasting Corporation on March 3, 2003, as supplemented on March 14, 2003, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁰ 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules, 18 FCC Rcd 13620, 13733 (2003), *aff'd in part and remanded in part*, *Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372 (2004), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004).

²¹ Furthermore, strict enforcement of our construction period and tolling rules fosters, not retards, competition. Forfeiture of a construction permit for failure to construct in a timely way fosters competition by providing an opportunity for existing stations to enhance their operations through minor modifications without the need to protect the defunct permit. During application filing windows, interested broadcasters have an opportunity to propose new stations or major changes to facilities using spectrum previously protected, and this, too, fosters competition. *See supra* note 16.